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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

HENRY G. TOUPAL,
PETITIONER.

vs.

NORMA R. TOUPAL,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILLIAM A. L'ESPERANCE
Counsel for Petitioner
609 Richmond Drive, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

QUESTION PRESENTED

DOES THE PREEMPTION CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBIT THE STATES FROM TREATING VETERANS DISABILITY BENEFITS AS DISPOSABLE COMMUNITY PROPERTY FOLLOWING MANSELL v. MANSELL?

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No. 90-

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OCTOBER TERM, 1990

HENRY G. TOUPAL,
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VS.

NORMA R. TOUPAL,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HENRY G. TOUPAL, by and through his attorney, William A. L'Esperance, petitions herein for a Writ of Certiorari to review the decision of the courts of the State of New Mexico refusing to modify a 1987 judgment to give retroactive and

prospective effect to this Court's Opinion in *Mansell v. Mansell*, 490 U.S. _____, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989), regarding the continued taking of a veteran's disability benefits pursuant to a 1977 decision dividing community property in a divorce action.

Petitioner contends that *Mansell*, supra, requires state courts cease from considering disability portions of retirement pay from community property allocations in pre-USFSPA (Uniformed Services Former Spouses Protection Act, 10 U.S.C. Sec. 1408 (1982)) cases.

OPINION BELOW

Certiorari was denied by the New Mexico Supreme Court to review the Opinion of the New Mexico Court of Appeals on April 17, 1990. The Court of Appeals Opinion is reprinted in full as Appendix A hereto. Said Opinion is published as: Toupal v. Toupal, _____ N.M. _____, 790 P.2d 1055 (Ct.App. 1990); cert. den., _____ N.M. _____, 790 P.2d 1032 (1990).

JURISDICTION

The Opinion appealed from was filed March 8, 1990. Petition for Writ of Certiorari was denied by the New Mexico Supreme Court on April 17, 1990. The time for filing this Petition was extended by order No. A-34, dated July 16, 1990, signed by Mr. Justice Byron R. White. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101 (c); 10 U.S.C. Sec. 1408 (a)(4)(E); and 38 U.S.C. Sec. 3101 (a).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Article VI, Clause 2, provides: "This Constitution, and the Laws of the United

States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

The first paragraph of the New Mexico Court of Appeals Opinion is a correct statement of the case (Appendix A). In addition it should be noted that the New Mexico Courts, by giving full effect to their pre-*Mansell* judgment *continue* to take disability pay from Mr. Toupal and are holding payments tendered to the court pursuant to that judgment (1988), being held in escrow pending final resolution of this matter by this Court. (See Stipulated Order, paragraphs 2, 3, 4 and 5, reprinted in full as Appendix B, hereto.) Further, as in *Mansell*, supra, Mr. Toupal waived part of his retirement pay so that he could receive this veterans' disability payment. Compare *Mansell*, supra, 104 L.Ed.2d 675, 687.

REASON FOR GRANTING THE WRIT

The New Mexico Court of Appeals decision (Appendix A) conflicts with that of the United States Supreme Court in *Mansell*, supra, which ought to be applied retroactively and prospectively, with respect to military disability benefits.

By failing to reopen the parties' post-divorce property division decree, the New Mexico Courts are refusing to be bound by the law of the land as contained in 10 U.S.C. Sec. 1408 (a)(4)(E) and 38 U.S.C. Sec. 3101 (a), as enunciated in *Mansell*, supra, and are thereby in direct violation of Article VI, Clause 2 of the United States' Constitution.

Henry G. Toupal is a former serviceman, retired from the United States Air Force. The decree dissolving his marriage to Norma R. Toupal did not dispose of his military retirement pay.

After the divorce, and after passage of 10 U.S.C. Sec. 1408 (1982), Norma moved to divide that asset. The district court divided the retirement pay, including the compensation which Henry receives for military-related disability. Henry obtained this disability pay by waiving a part of his retirement income, as was the case in *Mansell*, supra.

Henry challenged that division on appeal to the New Mexico Court of Appeals, arguing that preemption by the law of the United States made the distribution of the disability portion of his retirement income unlawful. The New Mexico appellate courts rejected this argument and held that the disability pay is community property, subject to division by the New Mexico courts.

After this Court's decision in *Mansell*, supra, Henry moved the New Mexico courts to reopen the question of property division, again arguing that the district court has no power to divide that portion of his military retirement pay denominated as disability. Henry requested that the disability portion of the division be vacated and requested that those sums on deposit in the district court registry be returned. This motion was denied, leading to the present appeal.

Petitioner submits that the rationale of the New Mexico Court of Appeals, left standing by the State Supreme Court, is contrary to the reasoning of *Mansell*, supra, and that this reasoning will adversely affect not only this Petitioner, but many other servicemen, similarly situated. It should be noted that the aggrieved husband in *Mansell*, supra, had also moved to reopen a stipulated property division decree made some years previously.

Therefore, the important question of law presented is simply the scope and effect of *Mansell*, supra.

The Petitioner suggests that the language of the statute denies the States the "power" to divide military disability benefits. The legislative purpose is clear enough: payments are

to be made to the seviceperson for service-connected disability. The disability is Henry's alone. The community did nothing to produce the disability or its attendant benefit. c.f. 32 CFR Sec. 63.6(e)(vi).

As shown in the language of this Court in *United States v. Estate of Donnelly*, 397 U.S. 286, 25 L.Ed.2d 312, 90 S.Ct. 1033 (1970), this is an appropriate case for at least limited retroactive application. (Henry does not seek refund of any and all retirement money, but only that portion taken in disregard of *Mansell*, supra.)

> "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally, the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence, except where bound by a final judgment in a particular case....In rare cases decision(s) (of the United States Supreme Court) might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute...but this is not such a case." *U.S. v. Estate of Donnelly*, 90 S.Ct. 1033, 1038.

In Mr. Toupal's case at bar, the effective date is 1982 with the enactment of the USFSPA, as in *Mansell*, supra. We are not dealing with a case where a new decision by this Court has overruled its own prior holding. The mere fact that Henry has attempted to reopen what New Mexico regards as a final judgment ought not to preclude the full application of *Mansell*, supra, so that the district court may disburse previously collected disability pay and cease dividing Henry's military disability payments now and in the future.

Mansell, supra, stands for the proposition that military retirement pay, taken as disability pay, cannot be divided by state courts in a divorce action, and that any such attempt at

division is preempted by federal law. *id.*, 104 L.Ed.2d 675, 689.

The question is what the federal policy is, not what the policy of New Mexico may be. "The relative importance to the state of its own law is not material when there is a conflict with a valid federal law...." *Free v. Bland*, 369 U.S. 663, 8 L.Ed.2d 180, 82 S.Ct. 1089 (1962).

CONCLUSION

Petitioner Henry G. Toupal respectfully requests that this Court issue its Writ of Certiorari, directed to the New Mexico Court of Appeals, and review the decision made by that court in its cause numbered 11,987. Upon such review, the Petitioner requests that the decision of that Court of Appeals be reversed, and that this Court enter its own decision, providing the petitioner with reimbursement from the lower courts for all portions of military disability pay previously taken from him, and prohibiting any further division of his military retirement pay.

Respectfully submitted,

William A. L'Esperance
Counsellor at Law
609 Richmond Dr., S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

APPENDIX A

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
(Filed Tuesday, April 17, 1990)

No. 19,078

HENRY G. TOUPAL,
Petitioner,

vs.

NORMA R. TOUPAL,
Respondent,

This matter coming on for consideration by the court upon Petition for Writ of Certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 11987 is hereby returned to the Clerk of the Court of Appeals.

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
(Filed March 8, 1990)

No. 11,987

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
Robert H. Scott, District Judge

NORMA R. TOUPAL,
Petitioner-Appellee,

vs.

HENRY R. TOUPAL,
Respondent-Appellant.

Robert G. Marcotte
Albuquerque, New Mexico — For Petitioner-Appellee

Joseph William Reichert
Albuquerque, New Mexico — For Respondent-Appellant

OPINION

BIVINS, Chief Judge.

This is a community property case. The parties were divorced in 1977. In 1987, after the passage of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. Section 1408 (1982), and pursuant to NMSA 1978, Section 40-4-20 (Repl. 1986), the trial court issued a judgment dividing husband's previously undivided military retirement benefits, including disability retirement benefits, as community property. Husband appealed the court's judgment and this court affirmed. Subsequently, the United States Supreme Court decided that the USFSPA preempts states from treating military disability retirement benefits as community property. *Mansell v. Mansell*, ___ U.S. ___, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). Husband then moved to modify the trial court's decision and, in a separate motion, to reopen the decision pursuant to SCRA 1986, 1-060(B). The trial court denied husband's motions, and husband appeals. The question before us is whether *Mansell* should be given retroactive effect to modify the trial court's 1987 judgment. We decline to give *Mansell* such effect.

We follow clear New Mexico Supreme Court precedent in making our determination. In 1981, the United States Supreme Court held that state community property principles were preempted by federal statutes governing military retirement pay, and that states could not treat such pay as community property. *McCarty v. McCarty*, 453 U.S. 210 (1981) (superseded by the USFSPA). Following that decision, a number of retired military pensioners whose divorces had become final prior to *McCarty* filed motions for relief from those final decrees. *See Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982). Our supreme court was faced, in *Whenry*, with the question of whether *McCarty* should be given retroactive effect, which might have allowed the retirees to reopen the judgments. The court refused to apply *McCarty* retroactively. *Id.*

The supreme court's refusal was based on a three-pronged

analysis applicable to the question of retroactivity of decisions made by a court. The court reasoned as follows: (1) *McCarty* established new law by overruling prior cases from New Mexico and other states treating military retirement as community property; (2) refusing to give *McCarty* retroactiveffect would not significantly affect the purposes furthered by that opinion; and (3) retroactive application would have an adverse impact on the judicial system and could work significant hardship on spouses forced to repay retirement payments they had received prior to the *McCarty* decision. Id.

As an alternative ground for decision, the supreme court held that the res judicata effects of judgments that had become final prior to *McCarty* were not altered by the fact that the judgments rested on New Mexico case law subsequently overruled by *McCarty*. *ID.* In sum, the supreme court ruled that retirees whose divorces had become final prior to the *McCarty* decision could not reopen the judgments based on that decision.

This case is analogous to the fact situation presented in *Whenry*. The judgment dividing husband's military retirement as community property became final before the *Mansell* decision. After *Mansell* was issued, husband moved to reopen the order pursuant to Rule 1-060(B). Therefore, only retroactive application of *Mansell* could provide husband the relief he seeks. As in *Whenry*, however, the law applicable to this question militates against a finding of retroactivity.

We begin by noting that nothing in the *Mansell* opinion mandates that it be given retroactive application. Absent such a mandate, we apply the same factors as those applied in *Whenry*. First, *Mansell* created new law by overruling prior New Mexico cases holding that disability retirement pay may be treated as community property. *See Austin v. Austin*, 103 N.M. 457, 709 P.2d 179 (1985); *White v. White*, 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987). In fact, *Mansell* overruled a decision of this court specifically applicable to husband, challenging the judgment that treated his disability pay as community property. Second, the *Mansell* decision did not espouse an

legitimate governmental interest to be served by preventing states from treating disability retirement as community property, so refusal to give the decision retroactive effect will not impinge on any important purpose furthered by the decision. *See White v. White* (agreeing with California case's statement that no legitimate governmental interest could be served by adopting *Mansell*-type position). Third, if *Mansell* is applied retroactively, the judicial system will be faced with the possibility of dealing with Rule 1-060(B) petitions from all military retirees whose divorces became final after 1981 and whose disability retirement payments were treated as community property. Ex-spouses who have been receiving such payments, in reliance on established New Mexico case law, will face the prospect of repaying those amounts with diminished resources. Ample grounds exist in this case to avoid the injustice and hardships which would result from retroactive application of *Mansell.*

The doctrine of res judicata provides an equally viable alternative ground for decision in this case, as it did in *Whenry.* Res judicata effects of a decision are not altered by the fact that the decision rests on case law overruled in a later case. *See Whenry v. Whenry.* This doctrine applies to United States Supreme Court opinions interpreting federal statutes, as well as to other types of opinions. *See United States v. Estate of Donnelly,* 397 U.S. 286 (1970) (giving retroactive effect to a decision interpreting a federal statute, but stating that such a result would not occur in cases in which parties are bound to a contrary result by a final judgment). The trial court's decision apportioning the retirement benefits, including the disability retirement benefits, constitutes a final decision that should be given res judicata effect under the authority of *Wenry* and *Estate of Donnelly.*

Husband argues the issue in this case is not retroactivity, because the trial court's decision applies to disability payments he is required to make post-*Mansell* as well as to the payments he made pre-*Mansell.* We note, however, that in his motion for

modification of the decree, husband requested that wife be ordered to reimburse him for all disability benefits paid to her as community property, including amounts paid prior to the *Mansell* decision. In addition, husband's argument fails because modifying the decree at this point would require the court to apply *Mansell* to the final judgment, issued before *Mansell* was decided, establishing that husband's disability retirement payments are community property. This is the essence of retroactive application of the *Mansell* decision and would run afoul of the retroactivity and res judicata principles discussed above. The mere fact that payment of this item of community property is to be made in a series of payments stretching beyond the date of the *Mansell* decision does not change the analysis. *Wenry v. Wenry.*

Pursuant to the foregoing, we affirm the trial court's refusal to modify the judgment issued in this case.

IT IS SO ORDERED.

(s) WILLIAM W. BIVINS, Chief Judge

WE CONCUR:

(s) THOMAS A. DONNELLY, Judge

(s) HARRIS L. HARTZ, Judge

APPENDIX B

APPENDIX B

IN THE SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO, STATE OF NEW MEXICO
(Filed March 4, 1988)

No. DR 85-03525

NORMA R. TOUPAL,
Petitioner,

vs.

HENRY G. TOUPAL,
Respondent.

STIPULATED ORDER

THIS MATTER coming before the Court upon the Court's order for the Respondent to appear and show cause, the attorneys for the parties having stipulated to settlement, and the Court having approved said stipulation, IT IS THEREFORE ORDERED:

1. Effective with the Respondent's receipt of his military retirement check on the first working day of March, 1988, he shall remit to Petitioner, through her attorney, an amount of money equal to 48.6% of the gross amount of the retirement pay which remains after deducting the V.A. disability portion.

2. Effective March 1, 1988, the Respondent shall deposit 48.6% of that portion of his military retirement pay that is V.A. disability compensation in an interest bearing account with the Court.

3. Said deposits shall continue for a period of eighteen (18) months from the date of this order.

4. If, during said eighteen month period, New Mexico state law is not retroactively preempted concerning the community property dividion of V.A. disability retirement pay, the Petitioner shall petition the Court for release of the deposited funds to her.

5. The issue of the Respondent's contempt is taken under advisement, subject to the parties' compliance with this stipulation.

6. Action on the arrearages of retirement pay owed to Petitioner by Respondent is stayed by the Respondent's having filed bankruptcy.

7. The Respondent shall provide to Petitioner's attorney a copy of his most recent retirement pay statement and shall also provide to Petitioner, through her attorney, copies of all future statements showing any changes in the retirement pay.

(s) SUSAN M. CONWAY, District Judge

STIPULATED TO:

(s) ROBERT G. MARCOTTE, Attorney for Petitioner

(s) WILLIAM A. SHORT, Attorney for Respondent